Sodexho Marriott Services, Inc. *and* Local 79, Service Employees International Union, AFL–CIO, CLC *and* Richard Bowie. Cases 7–CA–40637(1)(2), 7–CA–40942, and 7–RC–21246

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On December 1, 1998, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions, a supporting brief, an answering brief, and a reply brief, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this decision and to adopt the recommended Order as modified and set forth in full below.[3]

On January 1, 1998, the Respondent, Sodexho Marriott Services, Inc., assumed responsibility for providing environmental services at Botsford Hospital in Farmington Hills, Michigan. The Respondent brought in a new management team, but hired the former Botsford environmental services employees.

In December 1997, the Union, Local 79, Service Employees International Union, AFL–CIO, CLC, commenced an organizational campaign. That campaign intensified in January 1998. The Union filed its petition on February 4, 1998, and the election was held on March 12 and 13. The tally of ballots showed 62 for and 66 against the Union, with 17 challenged ballots. Both parties filed objections to the election. In addition, the Union filed unfair labor practice charges against the Respondent. The cases were consolidated. The judge concluded that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, and interfered with the laboratory conditions required for a fair election. He, therefore, recommended that the election be set aside and rerun, if following the counting of five challenged ballots (the challenges to which the judge found to be without merit), the Union failed to prevail.

We agree with the judge that the Respondent violated Section 8(a)(1) by interrogating employees concerning their union sentiments, disparately enforcing its no-distribution/no-solicitation policy against supporters of the Union, threatening employees with loss of wages and benefits, giving employees the impression that their activities on behalf of the Union were under surveillance, promising a raise and promotion to an employee if the employee abandoned support for the Union, and threatening employees about wearing buttons in support of the Union.

In addition, we agree with the judge that the Respondent violated Section 8(a)(3) by discharging employees Dennis Tookes, Ebony Thurmand, Shalonda Davidson, Dennis Barber, and Daryl Dillard, and lowering the performance evaluation of Richard Bowie because of their union activities. We also conclude, contrary to the judge, that the discharge of Cecelia McBride violated Section 8(a)(1) of the Act.

I. THE DISCHARGE OF DENNIS TOOKES

Dennis Tookes had worked at Botsford as a housekeeper since he was hired in August 1992, and he had an unblemished work record prior to his discharge on January 22. He was also one of the earliest supporters of the Union. As the judge found from the credited evidence, the Respondent was aware that Tookes met with a union organizer and signed and distributed authorization cards, and the Respondent unlawfully interrogated and threatened him for his union activities.

Tookes' discharge occurred the day after a confrontation between a group of employees and the Respondent over a delay in receiving paychecks. On January 7, the first payday after the Respondent took over the manage-

[1] There are no exceptions to the judge's recommended dismissal of the alleged 8(a)(1) violations discussed in the penultimate paragraph of sec. II,C,1, and in secs. II,C,2 through 5 of his decision.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Pars. 7(d) and 27 of the June 17, 1998 Second Amended Consolidated Complaint allege, in conjunction, that the Respondent violated Sec. 8(a)(1) of the Act on about January 21, 1998, by threatening employees with discipline and termination if they left the Respondent's facility in protest over a paycheck dispute. The judge set forth the facts underlying this allegation in the third paragraph of sec. II,C,1 of his attached decision, and he found the 8(a)(1) violation in the final two paragraphs of that section. We affirm that finding. Par. 1(c) of the judge's recommended Order remedies this violation. However, the judge inadvertently failed to refer to this unlawful conduct in his recommended notice to employees. We shall amend the notice to conform to the Order in this respect.

Also, the judge found that the Respondent unlawfully discharged several employees in violation of Sec. 8(a)(3) of the Act. Although par. 2 of the judge's recommended Order contains the appropriate affirmative remedies for these violations, there is no corresponding cease-and-desist provision in par. 1 of the recommended Order (although the judge did include appropriate language in his recommended notice). We shall amend the Order to include an appropriate cease-and-desist provision.

ment of environmental services at Botsford Hospital, paychecks arrived late. On January 21, the following payday, the paychecks were late again, and Team Leader Gregory Mahone called a meeting of approximately 25 employees that afternoon to inform them that paychecks would not arrive until later that evening or the following morning. The employees became quite agitated, and several, including Tookes, said, "No pay, no work." Tookes became the unofficial spokesman for the group and demanded to see Connie Silverstein, the general manager. The group proceeded to the door of the management office, where a number of employees shouted and used obscenities. During this incident, Tookes used several obscenities and kicked the office door, demanding to see Silverstein. Security was summoned, and the group dispersed. Silverstein emerged from her office and spoke briefly with Tookes and several employees who had not yet left the scene, but refused to answer questions and returned to her office.

Immediately after the incident, Mahone followed Tookes and two other employees into the restroom and said, "Dennis, you're too outspoken and they don't like that, watch your step, Ron[4] and Connie are out to fire you guys and clean house."

On January 22, the following day, on arriving for work, Tookes was sent to Silverstein's office. She told him he was being terminated and gave him a termination letter of the same date. The letter stated that Tookes was being terminated for "gross misconduct," "insubordination," "verbal accosting of a manager," and "failure to return to work as instructed by management" on January 21. Neither Silverstein nor anyone else in management discussed the reasons for his discharge with Tookes in any further detail. No other employee was disciplined for the preceding day's incident.

The Respondent asserts that Tookes was discharged solely for engaging in unprotected misconduct during the January 21 protest. The judge, however, concluded from the credited evidence that the Respondent used Tookes' behavior outside the management office during that incident as a convenient pretext for discharging him for unlawful reasons.

We agree with the judge that the Respondent's asserted reasons for the discharge were pretextual, and that the real reason for the discharge was the Respondent's antiunion animus. As noted above, although several employees in addition to Tookes shouted and used profanity during the January 21 confrontation, none but Tookes was disciplined. Before the discharge, Mahone told Tookes that he had seen him passing out union cards and gave him reason to believe he was under surveillance for his union activity. Immediately after the January 21 incident, Mahone told Tookes that management was "out to fire you guys and clean house."[5] In addition, Tookes was discharged on January 22 without any discussion, and without being given any chance to explain his conduct even though he had a perfect 6-year employment record. Given this evidence, we agree with the judge that the Respondent took advantage of the January 21 incident to conceal its unlawful motive for the discharge.[6] The discharge consequently violated Section 8(a)(1) and (3) of the Act.

It is true, as our dissenting colleague emphasizes, that an employee engaged in concerted activity may lose the protection of Section 7 by engaging in that activity in an egregious or abusive manner. If the factual context of Tookes' discharge were limited to the paycheck delay, the employees' consequent dissatisfaction, and Tookes' conduct on January 21—i.e., if there were no established surrounding context of union activity and employer animus—we would have no other evidence that the motive for the discharge was unlawful. It would then be necessary for us to determine whether Tookes' behavior in using profanity and kicking the Respondent's office door—which we do not condone—took him outside the zone of Section 7's protected concerted activity. However, because we agree with the judge that Tookes was discharged for his union activity before January 21, we need not make that determination. Even assuming arguendo that Tookes' behavior, viewed in isolation,

[4] "Ron" referred to Ronald Plasky, another team leader.

[5] Mahone also described himself to another employee shortly afterward as a "union buster [who] was there to clean house and would get rid of all the bad workers," and made other unlawful statements indicating the Respondent's intent to target union supporters.

[6] The judge found that "Tookes was terminated for engaging in protected concerted activity over the paycheck issue," but also that the Respondent had a "predetermined plan to create a reason to terminate Tookes and rid the facility of one of the leading union activists." He concluded by finding that the Respondent terminated Tookes "either for his engaging in protected concerted activities in violation of Section 8(a)(1) . . . or for his engaging in union related conduct in violation of Section 8(a)(1) and (3)."

In view of Mahone's comment to Tookes immediately after the January 21 incident, confirming that Tookes had already been targeted by management, and the additional credited evidence of the Respondent's continuing union animus, we find that the Respondent discharged Tookes for his union activity. Because we agree with the judge that the Respondent's stated reason for the discharge was pretextual, we need not go through the burden-shifting inquiry as to whether Tookes would have been discharged had he not engaged in union activity, as required by *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), of establishing that it would have taken the same action absent Tooke's union activities. *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991), enfd. 976 F.2d 744 (11th Cir. 1992); *Arthur Young & Co.*, 291 NLRB 39 (1988), enfd. 884 F.2d 1387 (4th Cir. 1989).

would have been a lawful basis for discharging him, the credited evidence affirmatively establishes that he was discharged for another reason which was unlawful under the Act.[7] Tookes' behavior on January 21 did not give the Respondent a license to discharge him for engaging in union activity. Accordingly, the discharge violated Section 8(a)(3).

II. THE DISCHARGE OF CECELIA MCBRIDE

The General Counsel asserted that Cecelia McBride was wrongfully terminated for refusing to answer questions at an investigatory interview for which she had requested an employee witness. He argued that because she had reasonable cause to believe that the meeting would result in disciplinary action being taken against her, she had the right to a witness. He also argued that the Respondent had changed its past practice of allowing employees to have witnesses during individual meetings with the Respondent's managers.

Rejecting the General Counsel's argument, the judge concluded that because McBride was not represented by a union, she did not have the Section 7 right to representation enjoyed by unionized employees.[8] Moreover, the judge reasoned, even if McBride had such a Section 7 right, it was not applicable here because the meeting at issue was not convened for the purposes of conducting an investigation. The judge, relying on the Board's decision in *Sears, Roebuck & Co.,*[9] concluded, therefore, that McBride was terminated for legitimate reasons unrelated to any protected conduct.

In *Epilepsy Foundation of Northeastern Ohio*, 331 NLRB 676 (2000), which issued after the judge's decision, the Board overruled *Sears* and held that the principles of *Weingarten*,[10] should be extended to employees in nonunionized workplaces. The facts here are as follows: On February 27, 1999, McBride returned to work following a 5-day absence for illness. Supervisor Greg Mahone saw McBride in the elevator and requested that she report to work in the linen room at the completion of her current task. McBride insisted, however, that she had been taken out of the linen room. Mahone testified that McBride also gave him other reasons why she would not go to the linen room. Mahone then directed her to report to his office to discuss the matter.

When McBride arrived at Mahone's office around 9:35 a.m., Environmental Services Managers Dee Houston, John Samara, and William Prout were present with Mahone in the office. McBride was accompanied by fellow employee Rodney Howard, whom she wanted to have as her witness. Mahone asked Howard to return to his work area. McBride protested that she wanted an employee witness before she would participate in the meeting. Mahone said that the Respondent did not have a policy of permitting employee witnesses to attend meetings concerning a work problem between an employee and supervisor. Mahone told Howard to return to his work area, and he did so.

Mahone then began the meeting, and after reiterating that the Respondent did not have a policy of permitting employee witnesses, he told McBride to report to the linen position. McBride again protested that it was unfair that there were other managers present in the office while she was not allowed to have an employee witness. Mahone asked McBride why she could not perform the linen room assignment. McBride protested again that she did not have a witness and that the meeting was unfair. Mahone asked her if she could document a condition that would prevent her from working in the linen department. McBride refused to answer. After attempting to elicit a response, Mahone said, *"[B]y acting silent and not responding to me* you are indicating to me that you are refusing to work in the position I am assigning. *This* action is in violation of [the Respondent's] work rules, is an act of insubordination, and is grounds for immediate termination." (Emphasis added.) McBride continued to remain silent. Mahone then terminated her, effective immediately.

The judge concluded that Mahone held the meeting with McBride for two reasons. The first was to explain to McBride that the Respondent did not have a policy of allowing employee witnesses during meetings to discuss work problems between an employee and supervisor. The second reason was to inquire whether McBride had any explanation for her refusal to work in the linen room.

The record does not support a finding that one of the purposes of the meeting was to explain the Respondent's policy regarding witnesses. McBride's demand for a witness occurred for the first time at the meeting. Therefore, it could not have been a motivating factor in scheduling the meeting.

Contrary to the judge, we believe that the second reason given for the meeting, to determine whether McBride had a particular reason for refusing to go to the linen room, supports the conclusion that the meeting consti-

[7] This conclusion is further supported by the events which led to the January 21 confrontation. Again, even assuming arguendo that Tookes' conduct outside the manager's office was unprotected, we find it highly unlikely that the Respondent would have terminated, without discussion, an employee with a perfect work record for his reacting with some heat to a second consecutive delay in receiving his pay.

[8] See *NLRB v. J. Weingarten,* 420 U.S. 251 (1975) (employee represented by union has right to union witness in investigatory interview which the employee reasonably believes may lead to discipline).

[9] 274 NLRB 230 (1985)

[10] Id.

tuted an investigation. In her conversation with Mahone at the elevator, McBride had refused to accept an assignment to the linen room. Refusal to accept an assignment was a violation of the Respondent's work rules constituting insubordination and could result in immediate dismissal. It was therefore reasonable for McBride to believe that her meeting with Mahone was an investigatory interview that might lead to disciplinary action against her. This entirely reasonable belief would almost certainly have been reinforced when McBride arrived for her meeting, only to find that Mahone had been joined in his office by three other managers, and when her chosen employee witness was shortly thereafter sent away. In the meeting, Mahone investigated McBride's refusal, trying to find out why McBride declined the assignment, and whether she had any medical or other mitigating circumstances to explain her refusal. Since the meeting constituted an investigation and was reasonably likely to lead to discipline, McBride had a right to a witness during the meeting. Yet, Mahone refused her request for a witness, and then proceeded to conduct the interview with three other managers present.

Our dissenting colleague, citing *Taracorp Industries*, 273 NLRB 221 (1984), contends that the General Counsel failed to prove that the discharge was based on McBride's assertion of her *Epilepsy Foundation* right to have another employee present rather than on her refusal to obey a work order. However, as noted above, the record establishes that Mahone discharged McBride specifically for remaining silent after she asserted her right to an employee witness. The direct correlation between the Respondent's action and McBride's assertion of her rights is not altered by Mahone's attempt to mischaracterize McBride's refusal to answer as a refusal to obey a work order. *Taracorp Industries* is therefore inapposite. See *Epilepsy Foundation*, supra at 680 fn. 14; *Safeway Stores,* 303 NLRB 989, 989–990 (1991).

III. UNION'S SECOND OBJECTION TO ELECTION—EMPLOYEE DISCHARGES

The judge concluded that the Respondent terminated five employees to discourage union activity, and thereby destroyed laboratory conditions and precluded a free and fair election. We agree with the judge that the five discharges were unlawful. However, they all occurred before the filing of the petition. Laboratory conditions begin with the filing of the petition. See *Goodyear Tire & Rubber Co.*, 138 NLRB 453, 455 (1962). Consequently, the discharges cited by the judge could not be deemed to destroy laboratory conditions.

However, contrary to the judge, we have found that the discharge of Cecelia McBride violated Section 8(a)(1) of the Act. The discharge occurred on February 27, after the filing of the petition on February 4. We find that the discharge of McBride did destroy laboratory conditions and precluded a free and fair election. We therefore affirm the judge's decision to uphold the Union's second objection.

ORDER

The National Labor Relations Board orders that the Respondent, Sodexho Marriott Services, Inc., Farmington Hills, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union membership, sympathy, and activity.

(b) Giving employees the impression that their activities on behalf of the Union are under surveillance.

(c) Threatening employees with discipline and termination if they leave the Respondent's facility in protest over a paycheck dispute.

(d) Threatening an employee for wearing union buttons in support of the Union.

(e) Informing an employee that the employee's less favorable evaluation is because of the employee's activity on behalf of the Union.

(f) Promising a raise and promotion to an employee if the employee abandons support and ceases activity on behalf of the Union.

(g) Disparately enforcing its no-distribution/no-solicitation policy against supporters of the Union.

(h) Threatening employees with the loss of benefits and jobs if they select the Union as their collective-bargaining representative.

(i) Telling employees not to discuss working conditions and the Union with other employees.

(j) Discharging or otherwise discriminating against employees for supporting the Union.

(k) Discharging or otherwise disciplining employees for requesting an employee witness or representative to be present at an interview reasonably likely to lead to discipline.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employees Dennis Tookes, Ebony Thurmand, Shalonda Davidson, Dennis Barber, Darryl Dillard, and Cecelia McBride full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. Additionally, the Respondent must reinstate the original perform-

ance evaluation of Richard Bowie prepared by his former supervisor.

(b) Make employees Dennis Tookes, Ebony Thurmand, Shalonda Davidson, Dennis Barber, Darryl Dillard, and Cecelia McBride whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from the files any reference to the unlawful discharges and the February 16, 1998 performance evaluation of Richard Bowie, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and the performance evaluation will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Farmington Hills, Michigan copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 21, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the ballots of employees Gloria Fox, Dennis Tookes, Ebony Thurmand, Dennis Barber, Cecelia McBride, and Darryl Dillard be opened and counted, and that a revised tally of ballots issue in Case 7–RC–21246.

IT IS FURTHER ORDERED that should the revised tally of ballots show that a majority of votes has been cast for the Union, then the Regional Director for Region 7 shall issue a certification of representative. If the revised tally shows that a majority has not been cast for the Union, the election shall be set aside and a rerun election conducted.

CHAIRMAN HURTGEN, dissenting in part.

Contrary to my colleagues, I would find that the discharges of Dennis Tookes and Cecelia McBride were lawful.

I. DISCHARGE OF DENNIS TOOKES

The judge found that Tookes engaged in protected concerted activity on January 21 and that he was discharged therefor, in violation of Section 8(a)(1). Alternatively, the judge found that Tookes engaged in union activity prior to January 21, and that he was discharged therefor, in violation of Section 8(a)(3). My colleagues rely solely on the alternative theory of violation. In my view, Tookes engaged in misconduct on January 21, and he was lawfully discharged therefor. That is, even assuming arguendo that union activity was a reason for the discharge, the Respondent would have discharged him in any event for his misconduct on January 21.

Under *Wright Line*,[1] the General Counsel must prove that antiunion animus was a substantial or motivating factor in the employer's decision to discharge. Once that showing has been made, the Respondent has an opportunity to prove its affirmative defense that it had a lawful reason for the discharge, and would have discharged the employee even in the absence of union activity. Here, assuming arguendo that the General Counsel has met his burden under *Wright Line*, the Respondent has shown that Tookes would have been discharged, even in the absence of union activity, because of his conduct on January 21.

My colleagues say that they do not condone Tookes' conduct of January 21. Further, they do not quarrel with

[1] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See, e.g., *New Orleans Cold Storage & Warehouse Co.,* 326 NLRB 1471 (1998) (analytical framework of *Wright Line* is applicable in dual or mixed motive cases after the General Counsel has established employee union activity, employer knowledge of that activity, animus towards such activity, and adverse action taken against those involved in, or suspected of involvement in, that activity).

the proposition that Tookes' conduct of January 21 could have been a lawful basis for discharge. Rather, they say that Tookes was "discharged for another reason," i.e., his antecedent union activity.

My colleagues' position concerning Tookes' conduct of January 21 is understandable. Tookes played a leadership role in the event. He exclaimed to Supervisor Ron Plasky, "Where's my pay check, mother-fucker?" . . . . "You got paid . . . you asshole, you give me some money." Tookes kicked and banged the office door. He demanded in a loud voice to see the General Manager Connie Silverstein, and said, "Where's fucking Connie?" This outburst was not precipitated by any employer unfair labor practice. On the contrary, the Respondent was trying to accommodate the employees by paying them on Wednesdays, which had been the customary payday under predecessor Botsford, rather than paying them on Thursdays, which is the regular payday at all of the other Respondent's facilities nationwide. In sum, Tookes acted as a leader and incited the hostile crowd; he directed vulgar epithets to a supervisor, and about the general manager; and he engaged in the physical outburst of kicking and banging the office door.

My colleagues conclude that the discharge was based on Tookes' antecedent union activity. That conclusion is clearly wrong. Tookes had been an open union advocate since December 1997, and the Respondent had not acted adversely toward him at all. It was only after he engaged in the misconduct of January 21 that Respondent fired him.

My colleagues also rely on the fact that Tookes was the only one discharged, despite the fact that other employees shouted profanities and participated in the events of January 21. However, Tookes was the leader and spokesperson for the group of employees who demonstrated on January 21. In addition, he alone was the person who kicked and banged the door of the Respondent's office and shouted profanities at a supervisor on that date. This was not a simple outburst of a few words. Tookes' action disrupted the workplace. In these circumstances, it is clear that the Respondent would have fired Tookes on January 22 for his conduct of January 21, even if Tookes had not engaged in union activity. I find, therefore, that Tookes' discharge was not unlawful under Section 8(a)(3) of the Act.

II. DISCHARGE OF CECELIA MCBRIDE

I also disagree with my colleagues' conclusion that the Respondent's investigatory meeting with McBride, and her subsequent discharge were unlawful. For the reasons set forth in my dissent in *Epilepsy Foundation of Northeast Ohio*,[2] I believe that the Board should continue the principle, established in *Sears*,[3] that an employee in a nonunion facility has no Section 7 right to the assistance of another employee at an investigatory interview. Moreover, even if McBride had a right to such assistance, and even if the denial of assistance was unlawful, the Respondent was not precluded from discharging her for the misconduct that led to the interview and which was repeated at the interview.[4] That is, the Respondent discharged McBride for refusing to work in the linen room. Such a refusal was insubordinate and provided lawful grounds for the Respondent's discharge of McBride.

My colleagues appear to conclude that McBride was discharged for making the request for employee assistance, i.e., for *asserting* her right to an employee witness under *Epilepsy Foundation*. However, the General Counsel has not established that her request was the reason for the discharge. The sequence of events at the meeting is important. The Respondent did not discharge McBride after she asked for assistance. Rather, The Respondent simply denied the request. McBride was discharged only after she refused the assignment to work in the linen room. Thus, the refusal to work, and not the request for assistance, was the reason for the discharge.

The Respondent asked McBride several times why she could not, or would not, do the linen room work, and she declined to answer. Finally, the Respondent advised her that her silence would be construed as a refusal to work, which would lead to discharge. Still McBride remained silent. She was then discharged for refusing to accept the work assignment to the linen room, a lawful basis for the discharge.

In view of my conclusion that the discharge of McBride was lawful, I also disagree with my colleagues' decision to sustain the Union's election objection which is based on that discharge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

[2] 331 NLRB 676 (2000).
[3] *Sears, Roebuck & Co*, 274 NLRB 230 (1985).
[4] *Taracorp Industries*, 273 NLRB 221 (1984).

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees concerning their union sentiments; disparately enforce a no-distribution/no-solicitation policy against supporters of the Union; threaten employees with loss of benefits; threaten to discharge employees who support the Union; threaten employees with loss of wages and benefits; give employees the impression that their activities on behalf of the Union are under surveillance; tell employees not to discuss working conditions and the Union with other employees; lower performance evaluations because of an employee's protected activity; promise a raise and promotion to an employee if the employee abandoned support for the Union; and threaten employees about wearing union buttons.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 79, Service Employees International Union, AFL–CIO, CLC, or any other union.

WE WILL NOT threaten employees with discipline and termination if they leave our facility in protest over a paycheck dispute.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL allow employees to have witnesses present in any meeting which is reasonably likely to lead to discipline or discharge and we will not discharge or otherwise discipline any of you for requesting a witness or representative to be present at an interview reasonably likely to lead to discipline.

WE WILL**,** within 14 days from the date of the Board's Order, offer Dennis Tookes, Ebony Thurmand, Shalonda Davidson, Dennis Barber, Darryl Dillard, and Cecelia McBride full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Dennis Tookes, Ebony Thurmand, Shalonda Davidson, Dennis Barber, Darryl Dillard, and Cecelia McBride whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Dennis Tookes, Ebony Thurmand, Shalonda Davidson, Dennis Barber, Darryl Dillard, and Cecelia McBride, and the February 16, 1998 performance evaluation of Richard Bowie and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and the performance evaluation will not be used against them in any way.

SODEXHO MARRIOTT SERVICES, INC.

Richard Czubaj, Esq. and *Dara J. Diomande, Esq.,* for the General Counsel.

Dennis M. Devaney, Esq., of Detroit, Michigan, for the Respondent-Employer.

Rita Smith, Esq., of Detroit, Michigan, for the Charging Party-Petitioner.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on July 6 through 10 and August 10 and 11, 1998,[1] in Detroit, Michigan, pursuant to a second amended consolidated complaint and notice of hearing (the complaint) issued by the Regional Director for Region 7 of the National Labor Relations Board (the Board) on June 17. In addition, on May 26, Region 7 ordered consolidated certain issues arising from the representation election in Case 7–RC–21246. The complaint, based upon original and amended charges in Cases 7–CA–40637(1)(2) filed by Local 79, Service Employees International Union, AFL–CIO, CLC (the Charging Party or the Union) and an original and amended charge filed by Richard Bowie (Bowie) in Case 7–CA–40942, alleges that Sodexho Marriott Services, Inc. (the Respondent or the Employer) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

The Union's petition was filed on February 4, and sought an election among certain of Respondent's employees. An election was held pursuant to a Stipulated Election Agreement, on March 12 and 13. The tally of ballots issued on March 13, shows that of approximately 149 eligible voters, 145 ballots were cast, 62 in favor of representation by the Union, 66 against, and 17 were challenged. The challenged ballots are sufficient in number to affect the outcome of the election. The Union and Respondent filed objections to conduct affecting the results of the election on March 20.

Thereafter, as noted, the Regional Director concluded that the allegations of the objections to the election along with the issues raised by the determinative challenged ballots in Case 7–RC–21246 parallel certain issues with the complaint allegations in Cases 7–CA–40637(1)(2) and 7–CA–40942, and ordered the consolidation of those cases for hearing before an administrative law judge. The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

[1] All dates are in 1998, unless otherwise indicated.

Issues

The complaint alleges that the Respondent discharged seven employees, changed an employee's performance evaluation to a lower rating, and engaged in numerous independent violations of Section 8(a)(1) of the Act including coercive interrogation, the disparate enforcement of its no-distribution/no-solicitation policy against supporters of the Union, threatened employees with loss of benefits, threatened to discharge employees who supported the Union, threatened employees with loss of wages and benefits, gave employees the impression that their activities on behalf of the Union were under surveillance, solicited employees to report the activities of other employees' on behalf of the Union, promised a raise and promotion to an employee if the employee abandoned support for the Union, and threatened employees about wearing buttons in support of the Union. The objections to the election track the complaint in part and raise similar issues.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the provision of a variety of food and environmental services to Botsford Hospital, with an office and place of business located at Botsford Hospital in Farmington Hills, Michigan, where it annually received materials and supplies in excess of $50,000 directly from points located outside the State of Michigan. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Before January 1, Respondent managed the food services function at Botsford Hospital. Effective January 1, it took over the environmental service responsibilities at Botsford and also continued with the management of food services. Respondent hired the former Botsford environmental service employees to perform this function. For this purpose, a management startup team was assembled and all new employees were subject to a 90-day probationary period. The transition period proved a difficult one for all parties concerned.

At all material times Gilbert Sherman was the district manager of Respondent; Connie Silverstein held the position of general manager, food, and environmental services; Ronald Plasky and Gregory Mahone served as team leaders for environmental Services; Kirk McBride and James R. Fuerst held the positions of human resource director and security manager; respectively, and John Samara held the position of an environmental services manager.

Janette Lovely, an employee of the Union, assumed the position of chief organizer in late December 1997, and was actively involved in soliciting union authorization cards from Respondent's employees.

B. The Union Campaign and Authorization Cards

The union campaign began in December 1997, when Lovely visited the Botsford Hospital cafeteria and discussed the benefits of the Union with a number of Respondent's employees. Thereafter, Lovely intensified her efforts and appeared in the cafeteria on January 15 and on three separate occasions on January 21, to meet with Respondent's employees. On January 21, authorization cards were passed out to numerous employees who signed same and returned them to Lovely. Around the lunch hour, a number of employees who were sitting at a table and discussing the Union, pointed out to Lovely that Team Leader Gregory Mahone was standing about 5 feet away and was watching them while they signed authorization cards.

On January 22, Mahone saw Lovely in the hallway and asked her, whether she was the union lady? On that same day, around lunchtime, Lovely was escorted out of the cafeteria by Botsford Hospital security personnel and was told that she could not meet with Respondent's employees. A member of the security detail told Lovely that Mahone called them and requested that Lovely be removed from the cafeteria. According to Lovely, Mahone made it a point to come to the cafeteria whenever she was there to meet with employees. Thereafter, on January 27, while Lovely was in the cafeteria, Mahone approached her, looked at his watch and told a number of employees sitting with her, "that he was watching and they better not be late for work."

C. The 8(a)(1) Violations

1. Allegations concerning Gregory Mahone

The General Counsel alleges in paragraphs 7(a) through (r) of the complaint that Mahone, during the period between mid-January 1998 and May 13, engaged in numerous independent violations of Section 8(a)(1) of the Act, including coercive interrogation, the disparate enforcement of Respondent's no-distribution/no-solicitation policy against supporters of the Union, threatened employees with loss of benefits, threatened to discharge employees who supported the Union, threatened employees with loss of wages and benefits, gave employees the impression that their activities on behalf of the Union were under surveillance, promised a raise and promotion to an employee if the employee abandoned support for the Union, and threatened employees about wearing buttons in support of the Union.

On or about December 15, 1997, employee Dennis Tookes met Lovely in the Botsford cafeteria to discuss the possibility of getting the Union to represent Respondent's employees and received a number of union authorization cards from Lovely. While Tookes was talking to Lovely, he saw Mahone observing their conversation. Later that day, Mahone asked Tookes who the lady was in the cafeteria. On January 15, Tookes met with Lovely in the cafeteria and told her a number of employees wanted to sign up for the Union. Tookes obtained additional union authorization cards and commenced passing them out. The next day, Mahone approached Tookes and told him he heard that Tookes was passing out union authorization cards.

In a conversation between Tookes and Ronald Plasky on January 21, Plasky told Tookes that he wished he would reconsider getting a union in the hospital and wait to see what the Respondent had to offer.

Tookes attended a meeting in the afternoon of January 21, wherein Mahone apprised the employees in attendance that their paychecks would be delayed. A number of employees including Tookes said to Mahone, "[N]o pay, no work." Mahone replied, "[I]f you sign out you will be fired." Immediately after a group of employees confronted Plasky and Silverstein about the delayed paychecks, Mahone followed Tookes and fellow employees Daryl Dillard and Richard Bowie into the restroom. Mahone said, "Dennis, you are to out spoken and they don't like that, watch your step, Ron and Connie are out to fire you guys and clean house."

Employees Carol Hammond, Richard Bowie, Ebony Thurmond, Shalonda Davidson, Gregory Sawyer, Daryl Dillard, and Cecilia McBride all testified that Mahone was present in the cafeteria on January 21, and observed them talking to Lovely and signing union authorization cards. Sawyer further testified that Mahone accused him on January 21, of passing out union cards and told him he could lose his position for passing out union cards. Later that day, Thurmond testified that Mahone observed her give a union authorization card to a coworker and told her that "he saw someone from the Union at the facility."

In late January or early February 1998, employee Richard Bowie had a conversation with Mahone in the hallway of the hospital. Mahone asked Bowie why he wanted to be in the Union and then said, "[H]e was a union buster and was there to clean house and would get rid of all the bad workers." On February 12, Bowie was shown his performance evaluation by his then immediate supervisor who was shortly leaving Respondent's employ. The ratings for each factor were scored as 1's and 2's on a 1–5 scale with 1 being the highest rating. On February 16, Bowie attended a meeting with Mahone, Connie Silverstein, and employee Carol Hammond. Mahone apprised Bowie that he was now his supervisor and showed him his revised performance appraisal that he changed to now reflect lower ratings in several categories. Mahone crossed out the prior supervisor's signature and inserted his own on the designated supervisory rating line. After the meeting, Mahone told Bowie, "[T]hat's what you get for union organizing."

On February 17, employee Rodney Howard had a conversation with Mahone concerning work problems and friction between Howard and his then supervisor. During the course of the conversation, Mahone said, "[I]f you do not vote for the union, I will give you a raise and promote you to the crew leader position."

Employee Richard Bowie was the union election observer on March 12. After the morning election session, Bowie was returning to his work area and overheard Mahone addressing the cafeteria workers in a meeting. Mahone said, "[I]f the workers voted no they won't lose their benefits."

On March 23, Bowie had a conversation with Mahone in the hallway of the hospital. Bowie regularly wore a union button to work and Mahone asked him why he continued to wear his union button to work now that the election was over and the Union lost. Mahone told Bowie that "if he wore his union button the next day, he would be terminated." Bowie wore four union buttons the next day but was not disciplined or terminated.

On May 13, Bowie received a memorandum from Mahone concerning daily job duties. Upon receipt of the memorandum, Mahone told Bowie to stop talking to his coworkers about the Union. In part, the memorandum stated:

> On a different note, I wanted to again ask you not to "vocalize" your concerns with management to co-workers and hospital staff. This type of behavior is "very disruptive" and must be stopped immediately. Your constant negative comments about your job and the work you do has become "irritating," "agitating" and "embarrassing" to several of your coworkers, hospital staff and patients. They have all complained to me that you are constantly putting down the Department they take pride in and enjoy working for and that they would "appreciate you keeping your comments to yourself." One such comment came from a patient who thought your comments were "unprofessional & disturbing."

The general test applied to determine whether employer statements violate Section 8(a)(1) of the Act is "whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of rights under the Act." *NLRB v. Aimet, Inc.,* 987 F.2d 445 (7th Cir. 1993); *Reeves Bros., Inc.,* 320 NLRB 1082 (1996).

I find that all of the above noted employees including Union Organizer Lovely credibly testified concerning their individual or group discussions with Mahone. Each of the employee's testimony has a ring of truth to it and was buttressed by their pretrial affidavits given to the Board at times close to when the conversations with Mahone occurred. I am suspect of Mahone's testimony, in which he denied all of the allegations attributed to him, for the following reasons. Mahone asserted that he did not become aware of the union organizing campaign until January 28. In addition to crediting the above noted testimony of Lovely and the other employees, which contradicts Mahone's assertions, Security Manager Fuerst visited the facility on January 22. On January 23, Fuerst met with Botsford Security Director Dave Brower, who informed him that the Union has made efforts to organize the employees. Fuerst memorialized this conversation (GC Exh. 19). Likewise, Plasky told Dennis Tookes on January 21, that he wished Tookes would reconsider getting a union in the hospital. Thus, it is inconceivable, with all of the above testimony to the contrary including the Fuerst memorandum, and Plasky's statement about the Union, that Mahone did not know of the Union's efforts to organize the employees before January 28. Accordingly, I conclude that if Security Manager Fuerst and Plasky knew about union organizing activity at the facility before January 28, then Mahone and all other Respondent managers were aware of its existence.[1] Accordingly, I find that Mahone made the statements attributed to him by the above noted employees.

[1] Fuerst is not an employee at the Botsford facility. Rather, his work location is in West Allis, Wisconsin. He arrived at the Botsford facility on January 22, to assist in the investigation of the paycheck situation.

Therefore, I conclude that the General Counsel sustained its burden of proof regarding paragraphs 7(a), (b), (c), (d), (e), (f), (h), (j), (k), (l), (o), (p), (q), and (r) of the complaint. In regard to paragraph (g) of the complaint, employee Cecelia McBride testified that she attended a meeting at the end of January 1998, which was conducted by Mahone and Connie Silverstein. During the course of the meeting, a union video was shown to the employees. At the conclusion of the meeting, McBride testified that Mahone stated that the Union would provide the employees with lies to which McBride responded that the Employer has lied about certain issues. Under these circumstances, I do not find that McBride's testimony regarding any statements that were made by Mahone during the course of the meeting violated the Act. Thus, I recommend that paragraph 7(g) of the complaint be dismissed. Concerning paragraphs 7(i), (m), and (n), the General Counsel did not present any evidence to sustain those allegations. Therefore, I recommend that paragraphs 7(i), (m), and (n) be dismissed.

In summary, I find that Mahone made the statements attributed to him in the noted paragraphs and conclude that those statements tend to coerce employees in the exercise of their Section 7 rights and that they violate Section 8(a)(1) of the Act. See *T&J Trucking Co.,* 316 NLRB 771 (1995) (threatening discharge); *Tube-Lok Products,* 209 NLRB 666, 669 (1974) (futility of selecting a union as collective-bargaining representative); *Marriott Corp.,* 310 NLRB 1152 (1993) (promising a wage increase during union campaign); and *House Calls, Inc.,* 304 NLRB 311, 319 (1991) (coercive interrogation).

2. Allegations concerning Debbie Brandemihl

The General Counsel alleges in paragraph 8(a) of the complaint that in early February 1998, Retail Manager Brandemihl threatened employees with loss of wages if employees selected the charging party as their collective-bargaining representative.

Employee Reginald Burines testified that he had a conversation with Brandemihl in early February 1998, wherein she raised the issue of the Union promising a $3-an-hour raise to employees, and questioned if that was guaranteed as unions make a lot of promises they cannot keep. Burines admitted that Brandemihl did not say anything about benefits during the conversation and did not threaten him with a loss of wages if the Union was selected as the bargaining representative. Brandemihl testified that she did have a conversation with Burines wherein she told him that if the Union came in, you could get a raise or you could not get a raise.

Under these circumstances, I do not find that the Act was violated and recommend that paragraph 8(a) be dismissed.

3. Allegations concerning John Samara

The General Counsel asserts in paragraph 8(b) of the complaint that on April 30, Samara threatened an employee with discharge if the employee continued to wear buttons in support of the Charging Party.

The General Counsel did not present any evidence to sustain this allegation. Accordingly, I recommend that paragraph 8(b) be dismissed.

4. Allegations concerning Connie Silverstein

The General Counsel alleges in paragraphs 9(a), (b), (c), and (d) of the complaint that on February 13, Silverstein in an employee meeting threatened employees with discharge and loss of benefits, gave employees the impression that their activities on behalf of the Union were under surveillance, and solicited employees to report back to Respondent regarding other employees' activities on behalf of the Union.

Employee Rodney Howard testified that he attended a meeting on February 13, conducted by Silverstein and Mahone wherein a union-related video was shown to the employees. After the completion of the video, Silverstein asked employees their opinion of the video to which some responded they were for unions and others were against them. Silverstein told the employees that she has received reports that union organizers were harassing them and if this was true to let her know about such conduct. Howard further testified that Silverstein stated at the meeting that she knew which employees were for the Union.

Silverstein testified that she did conduct a number of employee meetings at which union video's were shown but denied the remarks that were attributed to her. In regard to the allegations set forth in paragraphs 9 (a), (b), and (d) of the complaint, the General Counsel did not present any evidence to sustain such violations. Accordingly, I recommend that those paragraphs be dismissed.

With respect to paragraph 9(c) of the complaint, I have grave doubts that Silverstein told employees at the February 13 meeting that she knew who was for the Union. In this regard, before the election petition was filed on February 5, Director of Employee and Labor Relations David Bradford visited the Botsford Hospital facility and conducted extensive management training on what you can do and not do during an election campaign. Bradford instructed Respondent's managers in attendance at this mandatory training, including Silverstein, not to engage in any "TIPS" (threats, interrogation, promises, or spying). Bradford credibly testified that he utilized four videos during the course of the campaign that were shown to small groups of employees at the facility. The videos were also shown during the course of the hearing. The video's, entitled, "Little Card-Big Trouble," "Behind the Promises," "The Party is Over," and "SEIU 25th Hour" (R. Exh. 2, 3, 4, and 5), show that you can lose wages and benefits through bargaining, that there is no obligation to continue all existing benefits, it is not an unfair labor practice to offer less, that union's can trade away emoluments, and current benefits could be less through collective bargaining. I conclude that the video's are legitimate campaign propaganda and are not violative of the Act. I find, however, that the propaganda set forth in the video's caused Howard to interpret that Silverstein knew who was for the Union. I fully credit Silverstein's denial that she never stated during the course of the February 13 meeting that she knew who was for the Union. As set forth later in the decision concerning the discharge of Howard, I have grave concerns about his credibility as a witness. Thus, I find that Silverstein did not make the statement attributed to her by Howard.

Under these circumstances, I find that the General Counsel has not proven the allegations in paragraph 9(c) of the complaint and recommend that they be dismissed.

5. Allegations concerning Kirk McBride and Gilbert Sherman

The General Counsel asserts in paragraph 10 of the complaint that during employee meetings in early March 1998, McBride and Sherman threatened employees with loss of benefits if the employees selected the Charging Party as their collective-bargaining representative.

Employee Carol Hammond testified that she attended a March 3 meeting in the linen room conducted by McBride and Sherman wherein they stated that employees could lose their benefits and wages would decrease if they selected the Union as their collective-bargaining representative. Employee Renee Hinton testified that she attended a meeting conducted by McBride in the first week of March 1998, wherein McBride said the employees could lose all their benefits and would have to negotiate all over again on benefits. Based on my review of the four video's discussed above, I am of the opinion that McBride and Sherman merely restated what was contained in the election campaign video's and did not independently state to employees that wages or benefits would decrease if the Union was voted in. I base this conclusion on McBride's position as human resources director, his experience in election campaigns and the fact that he assisted Bradford with the training of managers prior to the commencement of the Respondent's election campaign. Moreover, I fully credit the denials of McBride and Sherman that they never threatened employees with the loss of benefits in any meetings that they conducted at the Botsford facility.

Under these circumstances, I find that the allegations set forth in paragraph 10 of the complaint have not been established and recommend that they be dismissed.

D. The 8(a)(1) and (3) Violations

1. The termination of Dennis Tookes

Dennis Tookes commenced work with Botsford Hospital in August 1992 as a housekeeper, and continued employment with Respondent after January 1, when they took over the Hospital's environmental service responsibilities. He possessed an unblemished work record, having never been disciplined at Botsford Hospital or Respondent until January 22.

Tookes was one of the earliest supporters of the Union and met with Union Organizer, Lovely, on December 15, in the Hospital cafeteria to discuss the possibility of getting the Union to represent Respondent's employees. Tookes credibly testified that on that date, while he was talking to Lovely, Mahone observed them engaged in conversation. Indeed, later that day, Mahone stopped Tookes and asked him who was that lady.

On January 15, Tookes met Lovely in the cafeteria and told her a number of employees wanted to sign up for the Union. He obtained additional union authorization cards and commenced passing them out. The next day, Mahone said, "I heard you were passing out union cards."

Tookes met again with Lovely in the cafeteria on January 21, and saw Mahone observing their conversation and witnessed he and other employees signing union authorization cards.

In an afternoon meeting on January 21, Mahone announced to approximately 25 assembled employees that their paychecks would arrive late because of delays experienced by the airborne express carrier. The mood of the employees became agitated, as this was the second time since Respondent took over on January 1, that the paychecks were late. A number of employees including Tookes said, "[N]o pay, no work." Mahone replied that "if you sign out, you will be fired." Tookes became the spokesperson for the group and demanded in a loud voice to see Silverstein. The group of employees then proceeded to Respondent's office and although Tookes denied banging and kicking on the office door and using profanity, I find based on the credible testimony of Ronald Plasky, Debbie Brandemihl, Office Manager Cheryl Kniffen, and Food Service Manager Sharon Ciaramitaro that Tookes did kick the office door and use profanity. He said, "[W]here is my pay check, motherfucker," "[Y]ou got paid asshole, give me your money," "and where is fucking, Connie." Plasky was able to locate Silverstein and security was summoned to break up the crowd and order employees to return to their jobs. While the crowd was breaking up, Silverstein came out of her office and briefly met with Tookes and the other employees but replied that she would not answer his questions because of the crowd's hostility and returned to her office.

Immediately after the crowd disbursed, Mahone followed Tookes, Darryl Dillard, and Richard Bowie into the restroom. The three employees credibly testified that Mahone said, "Dennis, your to out spoken and they don't like that, watch your step, Ron and Connie are out to fire you guys and clean house."

On January 22, Tookes went to pick up his paycheck but was told by Samara that his check was not there and he should proceed to the office. Tookes immediately went to the office and was told by Silverstein that he was being terminated. He was given a January 22 letter that states in pertinent part:

> This letter serves as formal notification that your employment with Marriott Management Services is hereby being terminated effective immediately for the following work related infractions which occurred on January 21, 1998;
>
> 1. Gross Misconduct
> 2. Insubordination
> 3. Verbal Accosting of a manager
> 4. Failure to return to work as instructed by management

Tookes proceeded to fill out paper work for the next 30 minutes but at no time did Silverstein or any other respondent official discuss with or explain to him any of the four reasons set forth in the letter as grounds for the termination.

The General Counsel asserts in paragraph 23 of the complaint that Tookes was terminated because he concertedly complained to Respondent regarding the failure of Respondent to distribute paychecks as previously promised. The Respondent takes the position that Tookes was lawfully terminated for the reasons set forth in the January 22 letter, with specific emphasis on the fact that he banged and kicked the office door and uttered profanity to Plasky and Silverstein.

The protected nature of Tookes and other employees efforts to protest Respondent's timely delivery of their paychecks has

long been recognized by the Board who has held that similar conduct comes within the guarantees of Section 7 of the Act. See *Joseph De Rairo, DMD, P.A.,* 283 NLRB 592 (1987). The Board has also held in *Mike Yurosek & Sons,* 306 NLRB 1037, 1038 (1992), that "individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are [sic] logical outgrowth of the concerns expressed by the group." In this case, I find that Tookes' complaints, on his own and the employees behalf, about the delayed paychecks and the statement "[N]o work, no pay," fall within protected concerted activity. See *Meyers Industries,* 268 NLRB 493, 497 (1984). This action, coupled with Mahone's January 21 statement that if you sign out, you will be fired, and the restroom conversation on the same day leads me to the inescapable conclusion that Tookes was terminated for engaging in protected concerted activity over the paycheck issue. Moreover, I find that Tooke's use of the words "motherfucker," "asshole," and "where is fucking Connie" while impulsive and ill advised, is not such violent or outrageous conduct which would render Tookes unfit for continued employment. See *Burle Industries,* 300 NLRB 498, 503–504 (1990). In this regard, I note that for the 6 years of employment with Botsford Hospital and Respondent, Tookes had an unblemished work record.[2]

The General Counsel also alleges in paragraph 28 of the complaint that Tookes was terminated because of his active participation in union activities.

In *Wright Line,* 251 NLRB 1083 (1990), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1993). In *Manno Electric,* 321 NLRB 278, 280 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

For the following reasons, I find that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations in terminating Tookes. First, the evidence establishes that Mahone knew Tookes met with Lovely in the hospital cafeteria on a number of occasions and signed a union authorization card on January 21. Second, Mahone accused Tookes of passing out union cards. Third, Mahone informed Tookes on January 21, that Connie was ready to fire him and they will clean house.

The burden shifts to the Respondent to establish that the same action would have taken place even in the absence of the employee's protected conduct.

The Respondent contends, as set forth in the January 22 letter, that Tookes was lawfully terminated for his actions on January 21, when he banged and kicked on the office door and uttered profanity to Plasky and Silverstein.

I find that the reasons advanced by Respondent are pretextual and suggest a predetermined plan to create a reason to terminate Tookes and rid the facility of one of the leading union activists. I base this finding on the fact that Mahone and other management officials had knowledge of Tookes union activities, accused him of passing out union authorization cards, and told him in the restroom that Connie was ready to fire him. It is apparent to me that the Respondent seized upon Tookes banging and kicking on the door and uttering profanity to shield its true motivation and reasons for the termination. I also note that Tookes was a longstanding employee at Respondent with an unblemished work record and at no time did the Respondent discuss, explain or give him an opportunity to respond to the reasons for the termination. Thus, I find that the Respondent relied upon pretextual reasons to shield its true motivation for Tooke's termination.

Accordingly, for the reasons noted above, I find that the Respondent terminated Tookes either for his engaging in protected concerted activities in violation of Section 8(a)(1) of the Act or for his engaging in union related conduct in violation of Section 8(a)(1) and (3) of the Act.

2. The terminations of Ebony Thurmand and Shalonda Davidson

The General Counsel alleges in paragraph 26 of the complaint that Thurmand and Davidson were terminated because of their activities on behalf of, and in support for, the Union. Contrary to the General Counsel's argument in its brief, I do not find that the complaint alleges that these employees were terminated because of engaging in protected concerted activities. The Respondent opines that both employees were terminated for legitimate business reasons because they falsified company documents signed out but noted 3:30 p.m. on the timesheet. In this regard, the timesheet reflects that Mahone signed his initials next to the entries of Thurmand and Davidson and informed both employees that if they signed out it could be grounds for job abandonment.

Thurmand and Davidson commenced work as housekeepers for Botsford Hospital on October 1, 1997, and continued employment with Respondent after January 1. Neither employee was disciplined during the course of their employment until January 22.

Thurmand and Davidson credibly testified that they were in the hospital cafeteria on January 21, with union organizer Lovely and other coworkers, and were observed by Mahone when they signed union authorization cards. Mahone asked both employees what were they doing.

Around 2 p.m. on January 21, Thurmand and Davidson attended a group meeting wherein Mahone apprised those in

[2] I make this finding, notwithstanding the Respondent's argument, that work-related infractions such as gross misconduct, insubordination, and profanity may be grounds for immediate dismissal.

attendance that their paychecks would be delayed because of problems with the airborne express carrier. Employee Dennis Tookes, who also attended the meeting said, "[N]o work, no pay" and Mahone replied to the employees at the meeting, "[T]hat if you sign out, you will be fired." As the meeting was about to break up, Thurmand and Davidson were upset and decided to sign out putting there regularly scheduled 3:30 p.m. sign-out time on the timesheet although it was approximately an hour earlier (2:15 or 2:30 p.m.). A number of the employees demanded to see Silverstein and the group proceeded down the hall to Respondent's offices. After Mahone ordered all the employees to return to work, both employees credibly testified that they went directly to their work stations, restocked their carts, and proceeded to the linen room. Neither Mahone nor any other respondent representative could conclusively establish that Thurmand and Davidson left the facility or abandoned their work area. Around 3 p.m. on January 21, Thurmand gave a union authorization card to a coworker and testified that she was observed by Mahone who said, "[T]hat he heard that someone named Jeanette was here earlier from the union hall."

On January 22, when both employees were given their paychecks, Respondent apprised them that they were being terminated for signing out early. Each employee informed Mahone and Silverstein that while they signed the timesheet 1 hour early, neither left the facility, nor punched out until their regularly scheduled 3:30 p.m. shift ended.

Under *Wright Line,* supra*,* the General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

I find that the General Counsel has established that the Respondent was motivated by antiunion considerations in terminating Thurmand and Davidson. In this regard, Mahone observed both employees signing union authorization cards on January 21, and later in the afternoon observed Thurmand give a union card to a fellow employee.

Respondent takes the position that both employees were terminated for falsification of company documents and refusal to complete job tasks. I find revealing that both employees were terminated the very next day after signing union authorization cards and that neither employee has an adverse work record. Second, both employees informed Respondent on the date of their discharge that they did not leave the facility at 2:30 p.m., but returned to their work area and did not punch out until there scheduled 3:30 p.m. work shift ended. At no time, however, did Respondent attempt to investigate these assertions by checking with other employees or reviewing the timeclock to verify if the employee's statements were accurate.[3] In this regard, employee Renee Hinton credibly testified that she saw Thurmand and Davidson punch out at 3:30 p.m. on January 21. Moreover, Director of Employee and Labor Relations David Bradford admitted that if Thurmand and Davidson did not leave the facility at 2:30 p.m. and returned to their work area before punching out at 3:30 p.m., they should not have been terminated. Lastly, examples of employee sign in/sign out sheets show that other employees have placed incorrect entries on the timesheets but were not disciplined (GC Exh. 22, 23, and 24). While Respondent argues, in regard to these other employees that it was not brought to their attention, I find that had they investigated the assertions raised by Thurmand and Davidson and examined other employee sign in/sign out sheets, they would have uncovered other incorrect entries.

Therefore, I conclude that Respondent did not conduct an impartial investigation, review other employee sign in/sign out sheets or check the timeclock, because Thurmand and Davidson engaged in protected conduct and were active union adherents.

In sum, the General Counsel made a strong prima facie case by presenting conclusive evidence showing that the union activity of Thurmand and Davidson was a motivating factor in the Respondent's decision to terminate them. Respondent has failed to carry its substantial burden of showing by a preponderance of the evidence, that in the absence of their union activity, the Respondent would have taken the same action. Accordingly, I find that by terminating Thurmand and Davidson on January 22, the Respondent violated Section 8(a)(1) and (3) of the Act.

3. The terminations of Dennis Barber and Darryl Dillard

The General Counsel alleges in paragraph 26 of the complaint that Dennis Barber, a 10-year employee, and Darryl Dillard, a 3-year employee, was terminated because of their activities on behalf of, and in support for, the Union. Respondent contends that both employees were terminated for legitimate business reasons because they willfully falsified company records by signing in at 7 a.m., when admitting to being 1-hour late for work.

Barber and Dillard signed union authorization cards on January 21, and were observed by Mahone talking to Lovely in the cafeteria. Both employees participated in the paycheck protest and after the crowd dispersed to return to work, Mahone followed Dillard into the locker room. Mahone told Dillard off the record, "[T]hat they were there to fire everyone in his department." Indeed, before Dillard was discharged on February 3, Respondent conducted a criminal search to discern whether he was convicted of any felonies from 1991 to the present.

On January 26, Barber called in around 7 a.m. and informed then-supervisor, Gloria Fox, that he and Dillard would be late for work. The employees arrived around 8 a.m. but were unable to sign the timesheet since it was collected and forwarded to the office. Both employees discussed the matter with Fox, who promised to put their names on the deviation sheet.[4] At the end of the day on January 26, both Barber and Dillard signed the timesheet to reflect that they worked from 7 a.m. to 3:30 p.m., rather than from 8 a.m. to 3:30 p.m. On January 30, Plasky spoke with both employees and asked whether they were late on January 26. They both admitted that they arrived 1-hour late on January 26 and Plasky said, "[D]on't worry

[3] Respondent's posthearing motion to strike the assertions in fn. 7 of the General Counsel's brief is granted. As admitted by the General Counsel, no such testimony appears in the transcript.

[4] A deviation sheet is filled out by a supervisor if an employee is late. The employee is paid for the hours he/she is actually present and working at the facility.

about it." On February 3, both employees were called to the office and were told by Silverstein that because their names did not appear on the deviation sheet for January 26, they would be terminated for falsification of company records.

Under *Wright Line,* supra*,* the General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

I find that the General Counsel has established that the Respondent was motivated by antiunion considerations in terminating Barber and Dillard. In this regard, Mahone observed both employees signing union authorization cards on January 21, and later in the afternoon told Dillard that they were out to fire everyone in his department.

Respondent takes the position that both employees were terminated for falsification of company records and that their names did not appear on the January 26 deviation sheet. I find telling that Fox, who was not called by Respondent to testify, did put Barber and Dillard on the deviation sheet for coming in at 8 a.m. on January 26. During the February 3 termination meeting, Respondent made no attempt to check with Fox as to the assertions raised by the employees that she promised to place their names on the deviation sheet. I conclude that when Silverstein told Barber and Dillard that their names did not appear on the deviation sheet, she misrepresented this fact because of their active support and activity on behalf of the Union. I also credit Barber's and Dillard's testimony that at the end of the day on January 26, while 30 employees were waiting behind them to sign out, they automatically signed the timesheet with their regular 7 a.m. to 3:30 p.m. hours of work, rather then willfully trying to get paid for an hour they did not work. In this regard, as reflected in Fox's January 30 memorandum, she did put Barber and Dillard on the deviation sheet that should have resulted in both employees being paid for their actual work hours of 8 a.m. to 3:30 p.m. (GC Exh. 25.) It is also highly suspect, that a number of other employees signed time-sheets either at the beginning of or at the end of the day with their starting and quitting times, yet none of these employees were terminated. Lastly, I find telling that Plasky told both employees not to worry about the discrepancy when they both admitted being 1-hour late. Thus, I conclude that the Respondent manufactured reasons to support the terminations of Barber and Dillard. The evidence supports and, I find, that the protected conduct of these employees was the true reason for their terminations.

In sum, the General Counsel established a strong prima facie case by presenting conclusive evidence showing that the union activity of Barber and Dillard was a motivating factor in the Respondent's decision to terminate them. Respondent has failed to carry its substantial burden of showing by a preponderance of the evidence, that in the absence of their union activity, the Respondent would have taken the same action. Accordingly, I find that by terminating Barber and Dillard on February 3, the Respondent violated Section 8(a)(1) and (3) of the Act.

4. The performance appraisal of Richard Bowie

The General Counsel alleges in paragraph 26 of the complaint that Richard Bowie's performance appraisal was lowered because of his activities on behalf of, and in support for, the Union. Respondent opines, that Bowie's performance appraisal was legitimately lowered when another supervisor who had direct knowledge of his performance reviewed it.

In early February 1998, employee Richard Bowie had a conversation with Mahone in the hallway of the hospital. Mahone asked Bowie why he wanted to be in the Union and then said, "[H]e was a union buster, would clean house and would get rid of all the bad workers." On February 12, Bowie was shown his performance evaluation by his then supervisor who was shortly leaving Respondent's employ. The ratings for each factor were scored as 1's and 2's on a 1–5 scale with 1 being the highest rating. Mahone testified that the supervisor only supervised Bowie for 3 or 4 days before he prepared the evaluation and overstepped his bounds by completing the numerical and narrative ratings for Bowie and 40 other employees. In this regard, Mahone asserted that it was necessary for him to rewrite all of these evaluations and discuss them with each of the employees. On February 16, Bowie attended a meeting with Mahone, Connie Silverstein, and employee Carol Hammond as a witness. Mahone apprised Bowie that he was now his direct supervisor and showed Bowie his revised performance appraisal that he changed to now reflect lower ratings in several categories. Mahone crossed out the prior supervisor's signature and inserted his own. After the meeting, Mahone told Bowie, "[T]hat's what you get for union organizing."

Under *Wright Line,* supra*,* the General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

I find that the General Counsel has established that the Respondent was motivated by antiunion considerations in lowering Bowie's performance appraisal. In this regard, I fully credit Bowie's unrebutted testimony that Mahone told him, "[T]hat's what you get for union organizing." Indeed, although Mahone testified at length during the hearing, he never denied the statement attributed to him by Bowie. Based on my earlier discussion regarding Mahone's credibility, I find that he made the above statement to Bowie.

In sum, the General Counsel established a strong prima facie case by presenting conclusive evidence showing that the union activity of Bowie was a motivating factor in the Respondent's decision to lower his performance evaluation. Respondent has failed to carry its substantial burden of showing by a preponderance of the evidence, that in the absence of his union activity, the Respondent would have taken the same action. In this regard, I reject Respondent's argument that because it issued a new performance evaluation to Bowie, it did not violate the Act. I find that the initial action of lowering Bowie's performance evaluation was solely undertaken to punish him for engaging in protected activities. Accordingly, I find that by lowering Bowie's performance evaluation on February 16, the Respondent violated Section 8(a)(1) and (3) of the Act.

5. The termination of Cecelia McBride

The General Counsel asserts in paragraphs 24 and 26 of the complaint that Cecelia McBride was terminated on February 27, because she refused to answer questions at a meeting that she had reasonable cause to believe would result in disciplinary action against her, and because of her activities on behalf of, and in support for, the Union.

Respondent argues that McBride was terminated for refusing to complete a work assignment and no investigatory interview or meeting was held on February 27.

McBride was hired at Botsford Hospital on August 26, 1997, and continued her employment with Respondent after the takeover on January 1.

McBride was present in the cafeteria with Lovely and fellow employees on January 21, and credibly testified that Mahone observed her and other employees sign union authorization cards.

McBride attended an inservice meeting in late January 1998, wherein a video about the Union was shown to those employees in attendance. At the conclusion of the meeting, McBride responded to a statement of Connie Silverstein that the Union was spreading lies during the election campaign with the statement that Respondent has also lied about certain issues.

McBride credibly testified about several instances after the January 1 takeover, wherein Respondent permitted employee witnesses to attend meetings when work problems are discussed between a supervisor and an employee. For example, McBride was permitted to have an employee witness at a February 17 meeting she had with John Samara, to discuss a work problem in environmental services. Additionally, on February 21, McBride attended another meeting with an employee witness and was given a coach and counseling memorandum by Samara. Silverstein testified that after the takeover, she became aware that Botsford had a practice of permitting employee witnesses to be present and attend meetings when work problems are discussed between a supervisor and an employee. In order to accommodate employees during the transition period, Respondent decided to continue this practice during the months of January to late February 1998, despite the fact that Respondent had no such policy at any of its facilities nationwide. Indeed, after discussing this issue with Sherman, Silverstein communicated to all her supervisors around February 25, that the practice of permitting employee witnesses to attend work-related discussions between a supervisor and an employee must cease immediately. Silverstein estimated that during the 2-month period, approximately five or six meetings took place in the presence of an employee witness.

McBride was out of work for about 1 week and returned on February 27. Around 8:45 a.m. Mahone saw McBride in the elevators and requested that she report to the linen room at the completion of her current duties. McBride replied, "I told you guys I was not going to do the Linen, you took me out of the Linen, I don't want to do the Linen." Mahone requested that McBride report to his office to discuss the matter. McBride reported to the office around 9:35 a.m. accompanied by employee witness Rodney Howard. Mahone requested that fellow Managers Dee Houston and John Samara attend the meeting and Manager William Prout was already in the office performing other duties. Mahone requested that Howard report back to his work area, and McBride protested that she wanted an employee witness before she would participate in the meeting. Mahone informed McBride that Respondent did not have a policy or practice requiring that an employee witness be present at meetings of this nature. Howard was instructed to leave the meeting and he returned to his work area. Mahone commenced the meeting and restated that Respondent did not have a policy of permitting employee witnesses to attend meetings concerning work problem issues between a supervisor and an employee. Mahone told McBride to report to the linen position for the remainder of the day and to work with Gloria Fox. McBride again protested and stated that it was unfair that there were other managers in the office, and she was not entitled to a witness. Mahone then asked McBride to provide a specific reason why she could not perform the linen room assignment. McBride protested again that she did not have a witness and the meeting was unfair. Mahone again asked McBride if she had any documentation that would prevent her from performing the linen room assignment. McBride refused to answer Mahone's questions. Mahone then told McBride that if she did not report to the linen position and refused to respond to his questions, it would be a violation of Respondent's work rules and an act of insubordination, giving rise to immediate termination. McBride stood silent and Mahone said, "[B]y acting silent and not responding to me you are indicating to me that you are refusing to work in the position I am assigning. This action is in violation of Respondent's work rules, is an act of insubordination, and grounds for immediate termination." Mahone, after McBride remained silent, terminated her effective immediately and demanded her ID badge and any other property of the Hospital that she had in her possession.

Under *Wright Line,* supra*,* the General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

I find that the General Counsel has established that the Respondent was motivated by antiunion considerations in terminating McBride. In this regard, Mahone was aware that McBride signed a union authorization card on January 21, and Silverstein knew from the dialogue she had with McBride in the inservice meeting, that she was an active suporter of the Union.

Respondent relies on McBride's refusal to accept the work assignment in the linen room and comply with orders as the reason for her termination (R. Exh. 16, item 9).

I am aware that Respondent knew that McBride was an active union supporter and signed a union authorization card on January 21. On the other hand, McBride admitted going to the laboratory to clean the restrooms rather than to the linen room as instructed. Likewise, the record establishes that Respondent knew about other employees that signed union authorization cards on January 21, yet those employees were not terminated.

Under these circumstances, I conclude that the Respondent has met its burden and find that it would have terminated

McBride for refusing to follow a work assignment even in the absence of her union activities.

The General Counsel also argues that McBride was terminated because she refused to participate in a meeting that she reasonably believed could lead to discipline without a witness and that the Respondent altered its policy of allowing employee witnesses as a result of the employee engaging in union activity.

It is axiomatic that an employee has a Section 7 right to request union representation at an investigatory interview where the employee reasonably believes that the investigation will result in disciplinary action. *NLRB v. J. Weingarten,* 420 U.S. 251 (1975). The Board in *Baton Rouge Water Works Co.,* 246 NLRB 995 (1979), held that under the Supreme Court's decision in *Weingarten*, an employee has no Section 7 right to the presence of his union representative at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision. It went on to state, however, that if an employer engages in any conduct beyond merely informing the employee of, and acting upon, a previously made disciplinary decision, the full panoply of protections accorded the employee under *Weingarten* may be applicable. In *Sears, Roebuck & Co.,* 274 NLRB 230 (1985), the Board held that nonunion employees do not have the same right of representation. Indeed the General Counsel acknowledges in its brief that, at present, the Board recognizes *Weingarten* rights are only applicable to union represented employees.

Applying the foregoing guidance to the instant case establishes that the employee witness is not a union representative as McBride's request for Howard was made at a time before the Board election. Thus, the protections and safeguards of *Weingarten* are not applicable in the subject case.[5] I also find that even if the *Weingarten* safeguards were applicable, the meeting was not convened for the purposes of conducting an investigation. Rather, Mahone held the meeting for two reasons. First, to explain to McBride that the Respondent did not have a policy that permitted employee witnesses at meetings held to discuss work problems between a supervisor and an employee and second, to inquire whether McBride had any reasons or documentation why she could not perform the linen room assignment. At this point, it cannot be established that the meeting involved an investigation or that there was any reasonable expectation of discipline. Thus, contrary to the General Counsel, I do not find that McBride was terminated for refusing to answer questions at an investigatory meeting in which she requested an employee witness because she had reasonable cause to believe that the meeting would result in disciplinary action being taken against her. Likewise, I do not find that the Respondent changed its practice of allowing employees to have an employee witness during individual meetings with Respondent's agents. In this regard, I find that Respondent never had a practice of permitting employee witnesses to be present at meetings regarding work problems between a supervisor and an employee. Rather, I conclude as an accommodation to the employees during the transition period, the Respondent permitted employee witnesses to be present on five or six occasions at work problem meetings between a supervisor and an employee. In my opinion, five or six occasions does not ripen into a term and condition of employment nor does it establish that the Respondent had a firm practice of permitting employee witnesses to be present at such meetings between a supervisor and an employee. Therefore, if there was never a practice of permitting employee witnesses to be present at individual meetings with Respondent's agents, McBride could not have been terminated for refusing to answer questions related to a change in the practice. Moreover, it was only after McBride refused to answer any questions about the work assignment and remained silent, that Mahone terminated her employment.

For all of the above reasons, I find that McBride was terminated for legitimate reasons unrelated to her protected conduct and not for refusing to answer questions at a meeting without an employee witness. Therefore, I recommend that the 8(a)(1) and (3) allegations in paragraph 28 of the complaint relating to McBride be dismissed.

6. The suspension and termination of Rodney Howard

The General Counsel alleges in paragraph 26 of the complaint that Rodney Howard was suspended on February 27 and thereafter terminated on March 6, because of his activities on behalf of, and in support for, the Union.

Respondent contends that Howard was suspended and terminated because he communicated threats of violence in the workplace rather than for his engaging in protected conduct.

Howard commenced employment with Botsford Hospital on March 1, 1992, in the housekeeping department and continued with Respondent after the takeover on January 1. Howard was one of the leading union adherents having met with Lovely in the cafeteria in December 1997, and again on January 21, when he signed a union authorization card. He also was instrumental in distributing authorization cards, union literature, and buttons to other employees and discussing the benefits of the Union with coworkers. On January 21, Howard participated in the group protest wherein employees were upset about the delay in the delivery of their paychecks. During the course of the protest, Howard told Plasky that the employees needed a union because they did not trust management. Plasky said that those are harsh words.

In early February 1998, Howard and Mahone had a conversation wherein Howard told him that the employees were trying to organize a union. Mahone told Howard that the employees do not need a union and everything will be all right. On February 17, Mahone told Howard that if he did not vote for the Union, he could receive a raise and be promoted to the crew leader position.

Secretary Cheryl Kniffen testified that on February 20, around 11:30 a.m. she was working in her locked office, heard a noise and observed Howard exiting the office. She immediately notified Silverstein as Howard was not authorized to be in the locked office. Howard asserts that he found the office door unlocked and opened the door to request Kniffen to inform a manager that he was leaving the facility to have lunch. According to Howard, Kniffen promised to apprise a manager that Howard was going to lunch. After Howard returned from lunch,

[5] In view of this holding, Respondent's posthearing motion to strike the General Counsel's legally insufficient argument regarding Board precedent, is denied.

he was informed that security wanted to see him. He went to the designated place and was accused by security of breaking into the office. The security person checked his key ring but was unable to determine that Howard possessed an extra key to the office. Accordingly, he was cleared of any charges associated with breaking into the office. Kniffen further testified that around 12:30 p.m. on that day, she observed Howard in the hallway outside of the administrative office with other employees. Howard was pointing at Kniffen and saying, "There she is, she's the one that told them I have a key." She asserts that Howard made the same remarks on February 23. On February 24, around 10 a.m., as Kniffen was returning to her office she passed Howard in the hallway, and heard him state, "I'm going to kill everyone in the office." Kniffen further testified that on February 25, around 12 p.m., she observed Howard pointing at her from outside the office and said, "She's the one." Kniffen was so concerned about Howard's statements, that she filed a police report and reported the matter to Silverstein.

Training Manager Judith McMahon testified that on February 27, around 7:45 a.m., Howard walked by the administration office. She heard Howard say, "[Y]ou better watch out, I may have a key." "Oh, no, that's right they changed the locks." A short while later, Howard returned to the office, jiggled the door and said, "There she is, she thinks I'm out to kill everybody." McMahon thought that Howard mistook her for Cheryl Kniffen, the secretary who reported what Howard previously stated on February 20 and 24.

Howard met with Security Manager Fuerst in the Hospital on February 27, and denied making the statements attributed to him. Fuerst advised Howard of Respondent's zero tolerance policy for communicating threats of violence in the workplace and informed him that he was being placed on suspension pending further review of the incident. On March 6, Silverstein notified Howard that the results of the investigation established that his actions and statements were threatening to the individuals involved. As Respondent has a zero tolerance for communicating threats of violence in the workplace, Howard was terminated effective March 6.

Under *Wright Line,* supra*,* the General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

I find that the General Counsel has established that the Respondent was motivated by antiunion considerations in suspending and terminating Howard. In this regard, Mahone was aware that Howard was one of the leading union adherents and signed a union authorization card on January 21. Additionally, Mahone offered Howard a raise and promotion to the crew leader position if he did not vote for the Union.

Respondent's affirmative defense asserts that Howard was suspended and terminated for communicating threats of violence in the workplace rather than for engaging in protected conduct. I find that Kniffen's and McMahon's testimony concerning this matter to be credible, concise, and supported by the interview notes of Fuerst recorded on March 2, a period close in time to the events in question (GC Exh. 18). Howard, on the other hand, appeared defensive and evasive as a witness and steadfastly denied making any of the statements attributed to him. Thus, I conclude his version of events cannot be credited.

Under these circumstances, I find that Howard was suspended and terminated for communicating threats of violence in the workplace rather than for his engaging in protected conduct and recommend that the 8(a)(1) and (3) allegations in paragraph 28 of the complaint related to Howard be dismissed.

III. THE UNION OBJECTIONS

The Union objected on 10 grounds to conduct that they claim affected the results of the election. As set forth in the Board's Order Consolidating Cases, a number of the union objections to the conduct of the election are coextensive and encompassed by the complaint.

1. The Union asserts that the Respondent granted wage increases on the Friday before the election, only if employees took their union buttons off and a manager stated that raises will go to the no voters. No evidence was presented to sustain this objection and I conclude it should be dismissed.

2. The Union contends that Respondent fired 15 employees to discourage union activity by other employees. In addition to the seven discriminatee's alleged in the complaint the Union introduced evidence in only one additional situation to establish that employees were terminated to discourage union activity. In this regard, the Union contends that Jermol Robinson was terminated because of his protected activity. I am not persuaded that Robinson was terminated because of his activities on behalf of the Union. Robinson was a part-time worker who continued in this status after Respondent's takeover on January 1. He did not meet with fellow employees in the cafeteria on January 21, and no evidence was submitted that he signed a union authorization card on that date. His union activities were minor at best. Robinson was terminated for lying on his employment application by not reporting that he had been convicted of a crime during the last 5 years. In this regard, Respondent conducted a background check on Robinson because a coworker reported to Silverstein that Robinson along with other employees had made threats about some of the managers. Mahone called him into the office and asked whether he was convicted of a crime in the last 5 years. Robinson admitted that he was convicted of a crime but told Mahone that he thought it occurred more than 5 years ago. The record establishes though that Robinson was convicted of a felony on September 8, 1995 (R. Exh. 22), and did not report it on his employment application. Under these circumstances, I find that the Union did not establish that the Respondent was motivated by antiunion considerations in terminating Robinson. Moreover, I find under *Wright Line*, that the Respondent would have taken the same action even in the absence of Robinson's union activities. On the other hand, I previously found that the Respondent terminated five employees to discourage union activity. Under these circumstances, I conclude that the Respondent's actions destroyed laboratory conditions and precluded a free and fair election. Thus, I conclude that Objection 2 should be sustained.

3. The Union asserts in this objection that Respondent threatened the loss of jobs if employees disseminated union

literature on nonworktime. Employee Renee Hinton credibly testified that in a conversation she had with Mahone, he stated that it was grounds for termination if you passed out union literature. I found Hinton to be a credible witness and consistent with my prior findings regarding the numerous violative statements made by Mahone to employees during the critical period, I conclude that Mahone made the statement attributed to him. Under these circumstances, I sustain Objection 3.

4. The Union asserts in this objection that Respondent threatened employees with the loss of their 401(k) plan if they vote for the Union. Employee Reginald Burines testified that on March 12, he walked in on an employee meeting held in the kitchen before the afternoon session of the Board election. He stayed in the meeting for approximately 10 minutes and heard Mahone state two things concerning the Union. Mahone told the employees that temporary employees could replace them and you could lose your 401(k) plan, if you do not vote, no. He testified that he listened attentively to that last statement because he was not familiar with the term 401(k) plan. I am inclined to credit Burines's testimony to this effect. First, he appeared very positive about this meeting and specifically remembered the term 401(k) plan. Second, as stated above, I previously found that Mahone engaged in numerous independent acts of 8(a)(1) conduct. Moreover, Burines's testimony is consistent with other witnesses who attended and testified about other meetings held on the days of the election. Accordingly, I find conduct of that nature interferes with a free and fair election and sustain the objection.

5. The Union alleges in this objection that Respondent's observer repeatedly asked employees how they would vote on both days of the election. Employee Melvalynn Brown testified that Respondent's observer, Ernskine Wade, asked prospective voters how they intended to vote despite repeated instructions from the Board agent to the contrary. Wade denied that he asked prospective voters how they would vote but did admit that he asked voters, do you want to vote blue or red. These are the colors used by Board observers to make a checkmark next to a prospective voter's name after they receive a ballot for the election. Wade also admitted that he was a practical joker and knew everyone who intended to vote by name. He was somewhat cavalier as a witness and I am inclined to believe that he did ask prospective voters how they intended to vote. Under these circumstances, I credit the testimony of Brown and find that such conduct precluded a free and fair election. Thus, Objection 5 is sustained.

6. The Union alleges in this objection that Mahone stated in the preelection conference that Dennis and Darryl are the individuals that were terminated for their union activities. Employee Richard Bowie was the union observer during the morning session of the election on March 12. He testified that Mahone stated in front of Union Representative Lovely and the Board agent that Respondent would challenge Barber and Dillard because they were dismissed for union activities. Lovely testified that she also heard Mahone make this statement and said to the Board agent, did you hear that? Mahone denied that he made such a statement during the prelection conference. Based on my prior credibility findings concerning Mahone, I find that he made the statement imputed to him and conclude that it interfered with a free and fair election. Therefore, objection 6 is sustained.

7. The Union contends that on both days of the election, Respondent assembled groups of employees in mandatory meetings with antiunion films and speeches. I previously found in Objection 4 that Mahone conducted a meeting on election day and discussed issues related to the Union with employees. Richard Bowie also credibly testified that he stood outside and overheard Mahone tell the dietary employees in a meeting around 8:45 a.m. on March 12, that if you vote no, you will not lose your benefits and if they voted yes, they would be replaced with temporary workers. Mahone denied that he conducted any meetings with employees on the days of the election. As I previously found, Mahone was not a credible witness and each of the employee's testimony regarding meetings held on the days of the scheduled election has a ring of truth to it. Under these circumstances, I find that the Respondent blatantly violated the rules applicable to parties that forbids election speeches on company time to massed assemblies of employees within 24 hours before the scheduled election. *Peerless Plywood Co.,* 107 NLRB 427, 429 (1953). This alone is a ground for setting aside the election and I find such conduct in the subject case precluded a fair and free election. Thus, this objection is sustained.

8. The Union alleges in this objection that Respondent threatened to use a temp service, if employees vote yes. In both Objections 4 and 7, I found that Mahone threatened employees that they could be replaced with temporary workers if they voted yes. Under these circumstances, I find statements of this nature interfere with the free and fair choice in an election and sustain this objection.

9. The Union alleges that Respondent used antiunion films portraying strike violence. In the body of the subject decision, I found that Respondent's use of four videos did not violate the Act. Each of the four presentations was a legitimate exercise of election campaign propaganda and did not threaten employees with the loss of benefits. Therefore, I do not find that such conduct interfered with the election.

10. The Union charged in this objection that Respondent managers intimidated groups of employees with statements indicating that employees will lose all benefits, and can refuse to bargain in favor of the Union. As I previously found, Respondent's representatives held a number of meetings either after the presentation of the videos or independently to answer questions about numerous issues in the campaign. In none of these meetings did I find evidence that Respondent threatened employees with the loss of benefits. Rather, the representatives merely restated the content of the videos, which in my view employees mistakenly perceived as threatening conduct. Under these circumstances, I do not find that the underpinnings of this objection were sustained.

IV. THE RESPONDENT OBJECTIONS

The Respondent filed two objections to the conduct of the election.

1. The Respondent alleges in its first objection that a number of union adherents congregated at the end of the hallway leading to the voting area and attempted to influence voters by say-

ing things such as "vote the right way." Employee Mary Johnson testified that after casting her vote on March 12, two individuals she thought were Darryl and Troup asked her if "she did the right thing." While I credit this testimony, Johnson could not specifically identify who the individuals were or if they were affiliated with the Union. Additionally, the question took place after Johnson's vote was cast and did not address whether she voted for or against the Union. Under these circumstances, I do not find that laboratory conditions were disturbed and conclude the objection should be dismissed. In any event, the Respondent withdrew this objection (fn. 7 of R. Br.).

2. The Respondent contends that after the submission of the *Excelsior* list on February 25, it provided a revised *Excelsior* list on March 10, which reflected the deletion of the names of four individuals (Inez Crumpler, Rodney Howard, Lionel Williams, and Cecelia McBride) who were no longer members of the unit as they had been terminated. The Board agent did not accept the revised *Excelsior* list but did receive into the record the cover letter identifying these four individuals who were no longer employed by Respondent. Respondent further alleges that employee, Cecelia McBride, who was previously terminated was permitted to cast a ballot during the voting. After its objections were filed, Respondent withdrew Objection 2, insofar as it alleged that Cecilia McBride, whom it contended was no longer eligible to vote, cast a ballot during the election. I am not inclined to sustain this objection for the following reasons. First, in accordance with the parties stipulated election agreement, the *Excelsior* list had to be and was provided to the Board on February 25. No agreement or provision was made to permit the Respondent to submit an additional revised *Excelsior* list. Second, the appropriate procedure for the Respondent to follow was to challenge any of these employees attempting to vote which is the mechanism the Respondent used as it related to Rodney Howard. In regard to employees Inez Crumpler, Lionel Williams, and Cecelia McBride, the record establishes that none of these employees attempted to vote in the election and were not challenged by the parties or the Board agent. Under these circumstances, the integrity of the election process was maintained and the laboratory conditions were not disturbed. Thus, I conclude that this objection should be dismissed.

In sum, I find that Union Objections 2, 3, 4, 5, 6, 7, and 8 are meritorious and recommend that the election be set aside and a rerun election conducted.

V. THE CHALLENGED BALLOTS

There were 17 challenged ballots during the March 12 and 13 election, 15 of which were challenged by the Board agent conducting the election because the names of the individuals did not appear on the voter eligibility list. Four of the challenged ballots involve the terminations of employees Dennis Tookes, Ebony Thurmand, Dennis Barber, and Darryl Dillard. Considering my prior findings that the above noted employees were terminated either because of engaging in protected concerted conduct and/or union activities, I conclude that their names should have appeared on the list of eligible voters and find that the challenges to their ballots should be overruled, that their ballots be counted and a revised tally of ballots issue.

With respect to the challenged ballot of Gloria Fox, the parties entered into an agreement in the report on determinative challenged ballots that Fox is included in the unit (GC Exh. 1). Therefore, the challenge to her ballot is overruled and it should be opened and counted.

In regard to the challenged ballot of Rodney Howard, and consistent with my above finding that he was lawfully terminated prior to the election, I find that the challenge to Howard's ballot should be sustained.

Concerning the remaining eleven challenged ballots, the parties agree that Vanessa Johnson, Cheryl Kniffen, Jeanette Mattox, Terry May, Velton Lee, Scott Kennedy, and Melvin Williams, are ineligible voters and their ballots should not be counted.[6] Thus, the challenges to their ballots should be sustained.

With respect to the challenged ballot of Karen Franklin, the Respondent introduced evidence to confirm that she is employed by Botsford Hospital and was ineligible to vote (R. Exh. 18). Accordingly, and particularly noting that the Union did not rebut this evidence, I find that the challenge to Franklin's ballot should be sustained.

In regard to the ballots of Alfonso Andrews and Margo Spencer, the charging party presented no evidence to establish that these employees were eligible voters. Accordingly, I find the challenges to their ballots should be sustained.

Lastly, the charging party asserts that Jermol Robinson was terminated for engaging in union activities and therefore, should be considered an eligible voter. Contrary to this position, and consistent with my above finding that Robinson was lawfully terminated prior to the election, I find that the challenge to his ballot should be sustained.

In sum, I recommend that the ballots of Gloria Fox, Dennis Tookes, Ebony Thurmand, Dennis Barber, and Darryl Dillard be opened and counted, and that a revised tally of ballots issues. If the revised tally of ballots shows that a majority of votes has been cast for the Union, then the Regional Director for Region 7 should issue a certification of representative. If the revised tally shows that a majority has not been cast for the Union, the election shall be set aside, based on the objectionable conduct discussed above, and a rerun election conducted.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by interrogating employees concerning their union sentiments, the disparate enforcement of its no-distribution/no-solicitation policy against supporters of the Union, threatening employees with loss of benefits, threatening to discharge employees who supported the Union, threatening employees with loss of wages and benefits,

[6] With respect to Johnson, Kniffen, Mattox, Lee, and Kennedy, the report on determinative challenged ballots confirms this fact. In regard to the ballots of May and Williams, the parties agreed during the course of the subject hearing that they were ineligible voters and their ballots should not be counted.

giving employees the impression that their activities on behalf of the Union were under surveillance, promising a raise and promotion to an employee if the employee abandoned support for the Union, and threatening employees about wearing buttons in support of the Union.

3. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by discharging employees Dennis Tookes, Ebony Thurmand, Shalonda Davidson, Dennis Barber, and Darryl Dillard and lowering the performance evaluation of employee Richard Bowie.

4. Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act when it terminated employees Cecelia McBride and Rodney Howard.

3. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees Dennis Tookes, Ebony Thurmand, Shalonda Davidson, Dennis Barber, and Darryl Dillard, it must offer each of them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Additionally, Respondent must reinstate the original performance evaluation of Richard Bowie prepared by his former supervisor.

[Recommended Order omitted from publication.]